In the case of *Annamalai Chettiar* v. *Yeoh Kee Tin*[3] this Court referred to and did not dissent from the decision in *Woon Onn* v. *Tan Yee Gek*[4] where it was held that for the purpose of ascertaining whether a tenant was in arrears with rent lawfully due any rent paid in excess of the standard rent under the 1948 Ordinance could be set off against the standard rent due. For myself I can see in this connection no distinction in principle between standard rent under the 1948 Ordinance and recoverable rent under the new Ordinance. They are both, so to speak, statutory rents and so it can only be said that rent lawfully due is in arrears when what has in fact been paid is less than the law says is recoverable.

Applying that principle to the present case it is very clear that on 4th September, 1957, the present appellant had since the commencement of the Ordinance paid by way of rent a sum very much in excess — about $500 in excess — of the maximum total amounts of rent recoverable under the provisions of the Ordinance. It follows, therefore, that on 4th September, 1957, if that was the material date, rent lawfully due as distinct from stipulated rent was not in arrears for 14 days or indeed in arrears at all, and it also follows that the appellant, the sub-tenant, was still entitled to the protection of the Control of Rent Ordinance. I should add that no other result would follow if any other date were taken as the material date, but I have not found it necessary to deal with the point because the whole case for the respondent has been conducted on the basis that the 4th September, 1957, is the appropriate date. The question of what is the material date will have to be litigated on some future occasion.

There remains the question of the counterclaim, because originally the defendant counterclaimed for the amount overpaid which of course she was entitled to do by reason of section 3(4) of the Ordinance. Clearly on the basis of what I have said the appellant is entitled to something on the counterclaim. She is entitled to the difference between on the one hand what in fact she paid from the commencement of the Ordinance down to the commencement of the present proceedings and on the other hand what she ought to have paid. That amount can be ascertained by agreement between the parties. If the parties are unable to agree on the amount, it will have to be ascertained by the Registrar on a formal enquiry.

I would, then, allow the appeal, set aside the order for possession and give judgment for the appellant on the counterclaim for an amount to be agreed between all the parties or in default of agreement to be settled by the Registrar on enquiry. The appellant should have her costs of all proceedings here and below and of course she is entitled to have paid out her deposit of $500.

**Good J.** and **Smith J.** concurred.

*Appeal allowed.*

## AD'AT BIN TAIB v. PUBLIC PROSECUTOR

[A. Cr. J. (Neal J.) August 24, 1959]

[Ipoh — Perak Miscellaneous Application No. 20 of 1959]

*Criminal Law and Procedure — Bail — Criminal Procedure Code (Cap. 6), s.388(i) — Criminal Justice Ordinance, 1953, s.2(1) — Effect of — Charging of an offence — Reasonable grounds for believing guilt.*

There is a wide distinction between the charging of an offence and of there being reasonable grounds for believing guilt. It may well be that in the initial stages of a criminal prosecution the fact that the Public Prosecutor has elected to charge a man with an offence coming within the proviso of section 388(i) of the Criminal Procedure Code (Cap. 6) may provide *prima facie* evidence of such reasonable grounds, but the law still remains that there must be reasonable grounds for believing the guilt.

*R.* v. *Chan Choon Weng & Ors.* (1) doubted.

The effect of the Criminal Justice Ordinance, 1953 in practice is that the only non-bailable offences are those punishable with death.

[**Editorial Note:** this case does not apply to Singapore as section 407(1) of the Criminal Procedure Code (Cap. 132) which corresponds to section 388(i) of the States Code uses the terms "imprisonment for life" instead of "penal servitude for life."]

*Case referred to:—*

(1) *R.* v. *Chan Choon Weng & Ors.* [1956] M.L.J. 81.

CRIMINAL REVISION.

*S. A. Lingam* for the applicant.

*Raja Azlan Shah* (Federal Counsel) for the respondent.

**Neal J.** (delivering oral judgment): This matter came before me by way of Criminal Revision. It had previously come before me on an application that the accused in Taiping Magistrate's Court Criminal Case No. 1080 of 1959 be admitted to bail by this Court. I declined to make any such order and pointed out that the appropriate procedure was an application for bail to the Magistrate and his refusal for granting could be the subject of appeal or revision by this Court. Accordingly counsel addressed the Magistrate in writing applying for bail and in support of his application for bail were tendered copies of affidavits filed in this Court wherein the applicant stated facts which threw some doubt as to whether or not he has been guilty of an offence under section 326 of the Penal Code. Instead of dealing with that written application as a fresh application for bail upon the grounds therein stated, the Magistrate in his reply said that he had refused bail once and he stated he had based his refusal on the statement of the law on section 388 of the Criminal Procedure Code as interpreted by Mr. Justice Spencer Wilkinson in *R.* v. *Chan Choon Weng & Ors.*,(1) where, in dealing with section 388(i) of the Criminal Procedure Code, that learned Judge said:—

"In my opinion there is no doubt in law that where an accused is charged with an offence punishable with life imprisonment a Magistrate has no power under section 416(1) to grant bail whether that offence is or is not also punishable with death."

Section 416(1) of the Straits Code is similar in terms with our section 388(i). It will be noted that the terms used in the Criminal Procedure

Code do not refer to the charge but to the question of reasonable grounds for believing the guilt in respect of a particular offence. In my opinion, there is a wide distinction between the charging of an offence and of there being reasonable grounds for believing guilt. It may well be that in the initial stages of a criminal prosecution the fact that the Public Prosecutor has elected to charge a man with an offence coming within the proviso of section 388(i) may provide *prima facie* evidence of such reasonable grounds, but the law still remains that there must be reasonable grounds for believing the guilt. As I said, I am inclined to the view that the statement of the law by Mr. Justice Spencer Wilkinson, to which I have referred, is an incorrect one, but for purposes of deciding the application before me, it is unnecessary for me to go that far. When *R.* v. *Chan Choon Weng & Ors.* was decided the Criminal Justice Ordinance No. 14/53 had already become law. Section 2(1) therein provides:—

"No person shall be sentenced by a Court to penal servitude; and every law conferring power on a Court to pass a sentence of penal servitude in any case shall be construed as conferring power to pass a sentence of imprisonment for a term not exceeding the maximum term of penal servitude for which a sentence could have been passed in that case immediately before the commencement of this Ordinance."

After the 30th April, 1953, all offences punishable with penal servitude had to be construed as if the words "penal servitude" were replaced with the term "imprisonment".

In reply to this argument, the learned Deputy Public Prosecutor suggested that section 2 was in effect an amendment of the words "penal servitude", wherever they appear, including section 388(i), to imprisonment. I am unable to agree with him because section 2 is clear in its terms when it says that it is only the laws "conferring power to pass a sentence of penal servitude" which are amended to a term of imprisonment not exceeding the maximum term of penal servitude for which a sentence could have been passed in that case immediately before the commencement of the Ordinance. I am strengthened in the view I take by the fact that the Legislature found it necessary to expressly amend section 301 of the Criminal Procedure Code by substituting "imprisonment and fine" for the words "penal servitude, rigorous imprisonment, and simple imprisonment." In my opinion, the effect of Ordinance No. 14/53 in practice is that the only non-bailable offences are those punishable with death.

The order of the Magistrate of the 29th June, 1959, refusing bail is set aside. The matter is referred back to the Magistrate's Court to re-hear the application for bail.

*Order accordingly.*

## LEONG POH CHIN v. CHIN THIN SIN

[A. C. J. (Good J.) August 27, 1959]

[Ipoh — Civil Appeal No. 12 of 1958]

*Contract — Claim based on illegal contract — Illegality of consideration not pleaded — Duty of Court — Contracts (Malay States) Ordinance, 1950, s.24.*

*Forest Enactment (Cap. 153), ss.20 and 22 — Permit under s.22(c) — Sub-lease of — Whether rights under permit transferable.*

The appellant in this case in consideration of a loan of $1,000 by the respondent entered into an agreement whereby he purported to assign all his rights and liabilities under a Forest Permit to the latter's wife. Under the Permit the appellant obtained the right to fell timber in a forest reserve and there was evidence that the respondent's wife did actually operate in purported exercise of rights assigned to her by the appellant.

The respondent obtained judgment against the appellant for the $1,000 claimed as money lent. On appeal the appellant was given liberty to add a new ground of appeal: "From the evidence before the Court the learned Magistrate should have found that the plaintiff was in *pari delicto* and his claim was based on an illegal contract and should have dismissed this claim on that ground. The Court should always take notice of the illegality of the contract even though it has not been specifically pleaded."

**Held:** (1) under sections 20 and 22 of the Forest Enactment a person cannot lawfully exercise rights in a reserved forest by virtue of permission granted to someone else. The respondent's wife's exercise of the purported rights assigned to her by the appellant was a breach of the provisions of the Enactment and an illegality;

(2) notwithstanding that illegality had not been pleaded in this case, it was the duty of the Court to take the point although the litigant had not taken it.

*Cases referred to:*—

(1) *Phillips* v. *Copping* [1935] 1 K.B. 15.

(2) *Hee Cheng* v. *Krishnan* [1955] M.L.J. 103.

CIVIL APPEAL.

*N. Sharma* for the appellant.

*J. R. Devadas* for the respondent.

**Good J.:** This is an appeal against the decision of the learned Magistrate, Ipoh, by which he gave judgment in favour of the plaintiff for $1,000 claimed as money lent. The facts are fully set out in the learned Magistrate's grounds of judgment.

By an order of this Court dated the 30th January, 1959, the Appellant was given liberty to add a new ground of appeal to his Memorandum of Appeal filed on the 9th October, 1958. This ground is as follows —

"From the evidence before the Court the learned Magistrate should have found that the plaintiff was in *pari delicto* and his claim was based on an illegal contract and should have dismissed this claim on that ground. The Court should always take notice of the illegality of the contract even though it has not been specifically pleaded."

I proposed to deal with this ground of appeal first since on the view that I have taken it disposes of the whole appeal.